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ABSTRACT

This review of the Brown Act and other open-meetings laws in California has been prepared to assist school-board members in understanding the intent as well as the letter of the law governing deliberations and actions taken by school-board members in board meetings. This volume, published in 1999 to reflect the most current--at that time--changes to the act, contains an addendum that details changes that went into effect in 2002. The Ralph M. Brown Act was originally enacted in 1974. A basic mandate of the act is that, with limited exceptions, all meetings of a school board in California must be open to the public. Certain business may be discussed and even acted upon in closed sessions. Such business is specifically defined within the act and California Education Code. Violations of the act can have far-reaching consequences, including criminal prosecution. This update discusses who must comply and what constitutes a meeting; types of meetings, and general requirements; agenda and posting requirements; closed sessions; records of meetings, and public access to documents; and enforcement, penalties, and remedies. Appended are 42 frequently asked questions, along with answers, about the Brown Act. (WFA)

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The Brown Act: School Boards and Open Meeting Laws.

California School Boards Association

July 1999

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FORWARD

The California School Boards Association, through its member school districts, receives numerous inquiries each year regarding the proper method of holding board meetings. Inevitably, these inquiries are answered by the Ralph M. Brown Act (California Government Code section 54950 through 54962) or by provisions of the California Education Code.

A basic mandate of the Brown Act is that with limited exceptions, all meetings of a school board must be open to the public. Certain business may be discussed and even acted upon in closed sessions; however, these topics are specifically defined within the Brown Act and the Education Code. Unless the closed session is being held on at least one of those topics, the closed session cannot legally be held.

Violation of the Brown Act can have far-reaching consequences, including criminal prosecution. Therefore, board members should be careful to familiarize themselves with and adhere closely to the requirements of the Brown Act and Education Code. If there is any doubt as to the proper course of action in a given situation, board members should seek legal advice from their district's legal counsel.

NOTE ON THIS EDITION

In 1994 amendments were made to the Ralph M. Brown Act that dramatically changed open meeting law requirements. These amendments, as well as those since, are discussed in the text of this publication.

In addition, this edition contains a summary of the Education Code's special rules on board meetings that are applicable to school districts. Where there is a clear inconsistency between Education Code and Brown Act rules regarding board meetings, the Education Code will probably prevail. However, in complex situations such as this, the district's legal counsel should always be consulted.

The Brown Act and Education Code are frequently amended by the state Legislature. In addition, California attorney general opinions and California court decisions define and redefine the limits to the act. It is impossible to state with accuracy what amendments will occur, nor can we revise this booklet as each amendment occurs. Districts are encouraged to consult the most recent version of the open meeting law's on a regular basis prior to carrying out any board action. Also, if the law's direction seems unclear, legal counsel should be consulted.

BROWN ACT CHANGES EFFECTIVE JANUARY 1, 2002

SB 671 (Ch. 45, Statutes of 2001) added Government Code §54957.10 to the Brown Act. This new law authorizes boards to hold a closed session in order to discuss a district employee's application for the early withdrawal of funds from a deferred compensation plan. The application for withdrawal, however, must be based on financial hardship arising from an unforeseen emergency due to illness, accident, casualty or other extraordinary even as specified in the deferred compensation plan. This intent of this new law is to protect an employee from the embarrassment of publicly airing personal and sensitive information, and is consistent with the "Personnel exception" of the Brown Act.

TABLE OF CONTENTS

CHAPTER 1
Introduction 1

CHAPTER 2
Who Must Comply and What Constitutes a Meeting? 5

CHAPTER 3
Types of Meetings and General Requirements 13

CHAPTER 4
Agenda and Posting Requirements 21

CHAPTER 5
Closed Sessions 29

CHAPTER 6
Records of Meetings and Public Access to Documents 43

CHAPTER 7
Enforcement, Penalties and Remedies 47

CHAPTER 8
Conclusion 51

APPENDIX
FAQs: Frequently Asked Questions About the Ralph M. Brown Act A-1

Chapter

1

INTRODUCTION

INTRODUCTION

This review of the Brown Act and other open meeting laws has been prepared to assist school board members in understanding the intent as well as the letter of the law governing deliberations and actions taken by school board members in board meetings.

There are two sets of rules applicable to school districts that state the general requirement that board meetings be open to the public:

- Government Code sections 54950 through 54962 (Title 5, Division 2, Chapter 9), commonly referred to as the Ralph M. Brown Act; and
- Education Code sections 35140 through 35149 (Title 2, Division 3, Chapter 2, Article 3).

The intent behind these open meeting laws is clear:

> *...the public commissions, boards and councils and other public agencies in this state exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.*
>
> *The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.*[1]

Public confidence and trust are probably the greatest assets of a public official or agency. One cannot earn confidence by careless disregard or ignorance of the law. In their meetings and relationships, boards

should use wisdom and good judgment to ensure deliberation and action that conform to the law.

The intent and purpose of the Brown Act is to ensure that "actions (of local legislative bodies) be taken openly and that their deliberations be conducted openly."[2] The general rule of the act is contained in Section 54953 which declares "All meetings of the legislative body of a local agency shall be open and public..." The Education Code also requires that, with limited exceptions, school board meetings be open to the public.[3]

These Government Code and Education Code sections make it clear that school board members must act and conduct all deliberations in open session meetings, unless the subject matter comes within a statutory exception allowing boards to hold a closed session. Exceptions to the public meeting standard are specifically limited as discussed herein.

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[1] Government Code section 54950.

[2] Ibid.

[3] Education Code section 35145.

Chapter

2

WHO MUST COMPLY AND WHAT CONSTITUTES A MEETING?

WHO MUST COMPLY WITH THE BROWN ACT?

The statutory mandate that all board meetings be open to the public necessarily requires an analysis of what a "board" is and how a "meeting" is defined. The Brown Act requires the governing boards of local agencies to hold their meetings in public except under specified, limited circumstances where closed sessions are authorized.[4]

The Brown Act imposes requirements on the "legislative bodies" of local agencies. School districts, community college districts, regional occupational programs (ROPs) and joint power authorities (JPAs) (created as separate legal entities) are all local agencies.[5] The governing boards of school and community college districts, regional occupational programs, joint power agencies, and county offices of education are "legislative bodies."

Besides the actual governing board of a local agency, Government Code section 54952 provides that the Brown Act applies to any commissions, committees, boards, or other bodies of a local agency, whether permanent or temporary, decision-making or advisory, created by resolution or any other formal action of a legislative body. However, advisory committees composed solely of members of the legislative body who are less than a quorum of the legislative body are *not* legislative bodies. The exception is any "standing committee" of a legislative body, irrespective of their composition, which have a continuing subject matter jurisdiction or a meeting schedule fixed by resolution or any other formal action of a legislative body, *are* legislative bodies subject to the act.

After enactment of the 1994 Brown Act amendments, other legislation was enacted to exempt specified committees and councils of school districts from the requirements of the Brown Act. Senate Bill 355 (Chapter 239 of the

Statutes of 1994) included the following exempted entities:

- a schoolsite council established at a school that participates in the school improvement program (SIP). (Education Code section 52012);
- an American Indian advisory committee in a district that has established an American Indian early childhood education program. (Education Code section 52065);
- a districtwide advisory committee on bilingual education established in a district with more than 50 pupils of limited-English proficiency. (Education Code section 52176);
- a schoolsite council established at each school that participates in school-based program coordination. (Education Code section 52852);
- a districtwide school advisory committee on compensatory education established pursuant to a compensatory education plan. (Education Code section 54425, subdivision (b));
- a parent advisory council established in any district receiving migrant education funds or services. (Education Code section 54444.2);
- a schoolsite council established in a district participating in school-based pupil motivation and maintenance programs. (Education Code section 54724);
- specified schoolsite councils and parent advisory committees mandated to continue in existence after "sunsetting" of their underlying programs. (Education Code section 62002.5)
- a committee established to participate in programs for the education of Indian children and to approve applications for federal grants to be used in such programs. (Title 25, U.S. Code, section 2604); or
- a parent involvement committee or council that consults with the school district and participates in the planning, design, implementation and evaluation of programs implemented under Chapter 1 of the federal Elementary and Secondary Education Act of 1965, as amended by Public Law 100-290 of 1988. (Education Code section 11503).

While exempted from the requirements of the Brown Act, these committees and councils are now subject to special public notice and meeting rules contained in SB 355. These special requirements are:

- all meeting are open to the public;
- members of the public may address the council or committee during its meeting on any matter within its subject matter jurisdiction;
- notice of the meeting must be posted at the schoolsites or at another

appropriate place accessible to the public at least 72 hours before the time set for the meeting;

- the notice of the meeting must contain the date, time and location of the meeting and an agenda specifying each item of business to be discussed or acted upon. No action can be taken on any item of business not on the posted agenda unless the council or committee members present, by unanimous vote, determine there is a need to take immediate action and the need for action came to the attention of the council or committee after the agenda was posted; and the agenda need not contain a description of questions or brief statements (made at a meeting by members of the council, committee or public) that do not have a significant effect on pupils or employees in the school or school district or that can be resolved solely by the provision of information.

If a committee or council violates any of the above procedural requirements, it must, upon the demand of any person, reconsider the item at its next meeting after allowing the public to address the item. SB 355 also requires that materials made available to a schoolsite council are "public records" under the California Public Records Act and must be made available to any member of the public who requests the materials.

The Brown Act also applies to any multi-member body that governs a private corporation or entity that either:

- is created by the elected legislative body in order to exercise authority that may be delegated by the elected body to a private entity, or
- receives funds from a local agency and the membership of whose governing body includes a member of the local agency's legislative body appointed to the governing body by the legislative body of the local agency.

These broad inclusions of entities other than the governing board are confusing. Legal counsel should be consulted to resolve any such issues.

In addition, the term "member of a legislative body of a local agency" includes any person elected to serve as a member of a legislative body who has not yet assumed the duties of the office. That person is directed by law to conform to the requirements of the act and will be treated for purposes of enforcement of the Brown Act as if he/she had already assumed office.[6]

A legislative body may require that a copy of the Brown Act be given to each member of the legislative body and to each person elected to the board before he/she takes office. An elected legislative body may also require that a copy of the Brown Act be given to the members of legislative bodies they appoint.[7]

WHAT CONSTITUTES A "MEETING?"

The Brown Act now defines a "meeting." The following are "meetings":

- any congregation of a majority of the legislative body in the same time and place to hear, discuss, or deliberate on any matter within the board's or agency's jurisdiction;[8]
- any use of direct communication, personal intermediaries, or technological devices (such as telephones and fax machines) by a majority of members of the board to develop a collective concurrence on action to be taken.[9]

Pursuant to Government Code section 54952.2(c), the following are *not* "meetings":

- individual contacts or conversations of a board member with any other person;
- attendance of a majority of members of the board at a conference or similar gathering open to the public involving a discussion of public issues, or issues of interest to public education agencies, provided a majority of the board do not discuss among themselves, other than as part of the scheduled program, specific business within the agency's jurisdiction. A meeting is "open to the public" even if the conference organizers charge a fee for attendance;
- attendance of a majority of members of the board at an open and publicized meeting organized to address a topic of local community concern by a person or organization other than the local agency, provided a majority of the board do not discuss among themselves, other than as part of the scheduled meeting, specific business within the board's jurisdiction;
- the attendance of a majority of members of the board at a purely social or ceremonial event, provided the majority of the board do not discuss among themselves specific business within the board's jurisdiction.

In determining whether a "meeting" of a legislative body is taking place, the formality or informality of the meeting cannot be used as a guideline. The main concern is whether a majority of the full board is present and whether deliberations on public business within the responsibilities of the board are taking place. The location of the meeting and

whether or not it is at a social gathering or behind closed doors are immaterial for the purposes of the Brown Act.

So-called "seriatim" meetings violate the Brown Act. Seriatim meetings occur when members speak individually to other members, and by contacting each other, one by one, a majority of board members reaches a decision on a proposed action or obtains information about the other members' views on a particular subject without the public's access. Two versions of seriatim meetings are the "hub-spoke" meeting and the "daisy-chain" meeting.

The hub-spoke version of a meeting occurs when one board member, or a representative of a board member, individually contacts other members to discuss an item of business or a transaction. The daisy-chain meeting occurs when one member calls another to discuss business and the second member calls a third to discuss the conversation, and so on.[10]

The mere presence of a majority of the board members at a social function does not create a meeting, but if a quorum of the board is present they should not take any collective action or deliberate collectively on school matters.

A majority of the board members at an open and publicly noticed meeting of one of their own standing committees does not create a majority of the board as long as those board members do not sit on the standing committee. But note that all standing committees are legislatitive bodies subject to the open meeting requierements (where a closed session is authorized). Those board members who do not sit on the standing committee should attend only as observers.

The Brown Act does not preclude all board members from attending conferences or workshops to increase their effectiveness as board members and to keep abreast of developments in education. However, such conferences cannot be used to circumvent the act. Thus, once again, if a quorum of the board is present, they should not take any collective action nor deliberate collectively on matters within the board's jurisdiction.

The Act, in Government Code section 54953.1, specifically allows members of a board to give testimony in private before the grand jury, either as individuals or as a body.

[4]The Brown Act is found in the Government Code, starting at section 54950. There are also special provisions for school board meetings found in the Education Code, starting at section 35140.

[5] Government Code section 54951.

[6] Government Code section 54952.1.

[7] Government Code section 54952.7.

[8] Government Code section 54952.2(a).

[9] Government Code section 54952.2(b).

[10] *Stockton Newspapers, Inc. vs. Redevelopment Agency* (1985) 171 Cal.App.3d 95, 103.

Chapter

3

TYPES OF MEETINGS AND GENERAL REQUIREMENTS

GENERAL REQUIREMENTS FOR MEETINGS

General

All board meetings must be open and public (except where closed meetings are specifically authorized; See Chapter 5) and all persons (not just local residents) must be permitted to attend.[11] Secret ballots may not be used for preliminary or final action;[12] this is true in both open and closed sessions.[13]

Conditions to attendance

No person may be required to give his/her name or provide other information as a condition of attendance at a board meeting. Any sign-in sheet, attendance list, or other similar document must state that signing it is voluntary and not a condition of attendance and that all persons may attend the meeting regardless of whether they sign, register or complete the document.[14]

Video and audio taping of meetings; broadcasting meetings

Anyone attending an open meeting of a legislative body may record it with an audio or videotape recorder or still or motion picture camera unless the body makes a reasonable finding that the noise, illumination, or obstruction of view will *persistently* disrupt the meeting. If the agency makes a tape or film record of an open session for any purpose, it becomes a public record that may not be destroyed for 30 days and must be available to the public for viewing or auditing on an agency recorder without charge.[15]

A board cannot prohibit or restrict broadcasting of its meetings unless it makes a reasonable finding that the broadcast cannot be accomplished without noise, illumination, or obstruction of view that would constitute a *persistent* disruption of the meeting.[16]

Video teleconference

Meetings by teleconferencing are permitted not only through video technologies but also through audio or a combination of the two. Agendas must be posted at each teleconferencing site.[17] As a condition of a teleconferenced board meeting, at least a quorum of the board must participate from within the district boundaries. Since special rules apply in these unique circumstances, legal counsel should be consulted.

Location of meetings

School boards may also attend conferences on nonadversarial bargaining techniques outside the district boundaries.

School boards may also meet outside the boundaries of their district to interview members of the public residing in another district regarding the potential employment of the superintendent of that district; they may also meet outside the boundaries of their district to interview a potential employee from another district.

Meetings of the governing board of a school district shall be held within the district except under the circumstances enumerated, or to do any of the following:

- Attend a conference on nonadversarial collective bargaining techniques;
- Interview members of the public residing in another district with reference to the trustees' potential employment of the superintendent of that district;
- Interview a potential employee from another district.

A joint powers authority (JPA) must meet in the territory of one of its members or as authorized under the conditions listed above. If the JPA has members throughout the state, a special rule applies — the JPA can meet in any facility in the state that doesn't discriminate or charge an admission fee.[19]

Public opportunity to address the board

Every *regular* meeting agenda must provide an opportunity for the public to address the board on items of public interest within the board's jurisdiction prior to or during board consideration of the item. However, no action may be taken on the item raised by the public comment unless the item is on the agenda or special authorization exists.[20] The agenda need not provide an opportunity for public comment on any item that has already been considered by a committee composed exclusively of board members at a public meeting where all members of the public were given an opportunity to address the committee before or during the committee's consideration, unless the item has been substantially

changed (as determined by the board) since the committee heard it.[21]

The agenda for a *special* meeting must provide an opportunity for members of the public to directly address the board concerning any item on the agenda prior to or during consideration of that item.[22]

The board may adopt reasonable regulations regarding public input, including but not limited to regulations limiting the time for each speaker and the total time on each topic.[23]

The board may not prohibit public criticism of policies, procedures, programs, or services of the district, or the acts or omissions of the board.[24] The Legislature has provided that this protected right to criticize does not grant any privilege or protection for such speech beyond what is already provided in law. This appears to mean that members of the public are not automatically protected by this Brown Act language if their remarks are defamatory. (See Chapter 4.) Other provisions of law, however, may insulate the speaker against a charge of defamation.

REGULAR MEETINGS

Time and place of meetings

The law provides that the governing board of each school district will fix the time and place for its regular meetings, and that this action, is proper notice to all members of the board of the regular meetings.[25] If a regular meeting falls on a holiday, it will be held on the next business day. If a fire, flood, earthquake, or other emergency renders the regular meeting place unsafe, the meetings may be held elsewhere as designated by the presiding officer or designee on a rapid notice to all news media that have, in writing, requested notice of special meetings.[26]

The governing board of any union or joint union high school district shall hold its regular meetings either monthly or quarterly; the governing board of any other high school district shall hold its regular meetings monthly.[27] The times at which the regular meetings of the governing board of a high school district are to be held should be prescribed by the rules and regulations adopted by such board for its own government.[28]

Organizational meetings

The governing board of each school district shall hold an annual organizational meeting. The date of the annual organizational meeting is determined by the date on which elected board members take office following a regular election.[29] The meeting is required to occur within a 15-day period commenc-

ing with that date.[30] Governing boards have the authority to determine which day during the 15-day period to hold the organizational meeting.

At the annual organizational meeting, the governing board of each high school district, union high school district, and joint union high school district shall organize by electing a president from among its members, and a clerk. At the annual organizational meeting, each city board of education shall organize by electing a president from among its members. At the annual meeting, the governing board of each other type of school district, except a community college district, shall elect one of its members clerk of the board.[31]

SPECIAL MEETINGS

Special meetings are designed to allow boards to deliberate and/or act prior to the next regular board meeting. Special meetings usually take place in order to meet time deadlines. So long as the president or majority of the board calls the meeting, proper notice is given, and the agenda is timely posted (see Chapter 4), a special meeting is proper. The call and notice must be posted at least 24 hours prior to the special meeting in a location that is freely accessible to members of the public during the entire 24 hours. *No business other than the business on the agenda can be considered at special meetings by the governing board.*[32]

ADJOURNED MEETINGS

If the business of a board has not been completed at a regular or special meeting, or at an adjourned regular or adjourned special meeting, the board may adjourn that meeting to a subsequent time so long as proper notice of the adjournment (including the new time and place) is conspicuously posted within 24 hours after the time of the adjournment.[33] In addition, Government Code section 54955.1 also provides for the continuance of "hearings" by a legislative body, subject to the same notice requirements as adjourned meetings, unless the hearing is "continued to a time less than 24 hours after the time specified in the order of notice of hearing" in which case a copy of the order or notice of continuance of hearing must be posted immediately after the meeting at which the order or declaration of continuance was adopted or made.

EMERGENCY MEETINGS

Emergency meetings of the board are governed by Government Code section 54956.5. In summary, emergency meetings may be held only in public session and under circumstances where either of the following situations arises requiring prompt action due to the disruption or threatened disruption of public facilities:

- Work stoppage or other activity that severely impairs public health or safety, as determined by a majority of the members of the board.
- Crippling disaster that severely impairs public health or safety, as determined by a majority of the members of the board.

Emergency meetings may be held by the board without complying with either the 24-hour notice or posting requirement, though all other special meeting restrictions apply. For other rules applicable to emergency meetings, see the statute and discussion in Chapter 4.

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[11] Government Code section 54953; Education Code section 35145.

[12] Government Code section 54953(c).

[13] Government Code sections 54957.1, 54953(c).

[14] Government Code section 54953.3.

[15] Government Code section 54953.5.

[16] Government Code section 54953.6.

[17] Government Code section 54953(b).

[18] Government Code section 54954.

[19] Government Code section 54954(d).

[20] Government Code section 54954.3(a). Please note Education Code section 35145.5 also permits the public to place matters on board agendas and to address the board regarding all items on the agenda "as such items are taken up." Education Code section 35145.5 also permits the taking of testimony on items the public wishes to bring up at a meeting which are not on the agenda, provided no action is taken at that meeting *(unless authorized by section 54954.2 of the Government Code)*.

[21] Government Code section 54954.3(a).

[22] Government Code section 54954.3(a).

[23] Government Code section 54954.3(b).

[24] Government Code section 54954.3(c).

[25] Education Code section 35140.

[26] Government Code section 54954(e).

[27] Education Code section 35141.
[28] Education Code section 35142.
[29] Elections Code section 23556 (first Friday in December).
[30] Education Code section 35143.
[31] Education Code section 35143.
[32] Government Code section 54956; Education Code section 35144.
[33] Government Code section 54955.

Chapter

4

AGENDA AND POSTING REQUIREMENTS

AGENDA DESCRIPTIONS

Government Code section 54954.2 does not define how specific the agenda descriptions must be; it provides only that the agenda description must contain a "brief general description" of an item. It further states that the description generally does not need to exceed 20 words. However, guidance may be taken from relevant court decisions. In *Carlson vs. Paradise Unified School District* (1971) 18 Cal.App.3d 196, the court, commenting on the specificity required for a school board agenda, provided:

> *...it is imperative that the agenda of the board's business be made public and in some detail so that the general public can ascertain the nature of such business. It is a well-known fact that public meetings of local governing bodies are sparsely attended by the public at large unless an issue vitally affecting their interests is to be heard. To alert the general public to such issues, adequate notice is a requisite.*

Thus, an agenda description must provide the public with sufficient notice so citizens may have time to determine if they want to attend the meeting.

PUBLIC TESTIMONY EXCEPTION

The Brown Act also provides an exception for discussion of matters not on the agenda where such matters are raised by the public, i.e. the "public testimony" exception.[34] Specifically, Government Code section 54954.3 requires that every agenda for a regular meeting provide an opportunity for members of the public to directly address the governing board on any item of interest to the public before or during the governing board's consideration of

the item. However, the governing board, without complying with special procedures, cannot act on the item since it did not appear on the agenda.

Public testimony is limited to matters that are within the governing board's power to act. Further, the public testimony "right" does not extend to any item that has already been considered by a committee, composed exclusively of members of the legislative body, at a public meeting where the public was provided the opportunity to address the committee on the item before ordering the committee's consideration of the item.

It should also be noted that Education Code section 35145.5 permits the public to place matters on board agendas and to address the board regarding all items on the agenda "as such items are taken up."

The public's authority to address the board at meetings is not without limit. Government Code section 54954.3 authorizes boards to adopt reasonable regulations regarding the method in which such public testimony shall be carried out. The regulations may include limitations on the total amount of time allocated for public testimony on a particular issue and/or for each individual speaker. The regulations may not limit public criticism of policies, procedures, programs, or services of the agency, or acts or omissions of the board. The public's remarks, however, are not protected beyond the current law and may give rise to potential defamation actions.[35]

Members of the governing board or their staff may briefly respond to statements made or questions posed during the public testimony period. However, no action may be taken by the board where the item is not on the agenda unless one of the three exceptions, described in the next section, exists.[36] In addition, members of the board or their staff may ask a question for clarification, make a brief announcement, provide a reference to staff or other resources for factual information, or request staff to report back to the body at a subsequent meeting concerning any matter. In addition, board members or the board's staff may make a brief report on their own activities. Finally, a member of the board or the board itself, subject to board rules and procedures, may take action to direct that a matter of business be placed on a future agenda.

REGULAR MEETINGS

Agenda and posting requirements

As discussed previously, Education Code section 35140 and Government Code section 54954 require a governing board to determine the time and

place of its regular meetings. At least 72 hours prior to the regular meeting, the board must post an agenda containing a brief description of each item of business *to be transacted or discussed* at the meeting.[37] The agenda must specify the time and location of the regular meeting and be posted in a location freely accessible to members of the public during the 72-hour period.[38] Where teleconferencing is to be utilized for the receipt of public comment or testimony by the board, or for its deliberations, agendas shall be posted at each teleconference location.[39]

Items not appearing on regular meeting agenda

Section 54954.2 also states that except in certain specified instances (see below), no action or discussion may be undertaken on any item not appearing on the posted agenda. Because no prior notice would be provided to the public under these unusual circumstances, a board must take care to fully comply with all conditions for any such action. Limited authority to act on non-agendized items applies *only to regular meetings;* no such action can occur at a special meeting.

In all cases where a board desires to act on a matter that is not on the regular meeting agenda (under Government Code section 54954.2), a board must first publicly identify the new item prior to discussing it. This means it must state publicly what would be a legally sufficient description of the new item. Then, in the following instances and under the following conditions, the board may take action on items of business not on the posted agenda:

- upon determination by a majority vote of the board that an "emergency situation" exists. Government Code section 54956.5 defines what constitutes an "emergency situation." (See emergency meetings below);
- upon a determination by a two-thirds vote of the board members present at the meeting, or, if less than two-thirds of the members are present, a unanimous vote of those members present, that there is a need to take immediate action and that the need for action came to the attention of the district (not just the board) after the agenda was posted; or
- the item was posted on the meeting agenda for a prior regular meeting of the board occurring not more than five calendar days prior to the current meeting, and then continued at that prior meeting to the meeting at which action is being taken.

SPECIAL MEETINGS

Under Education Code section 35144 and Government Code section 54956, a special meeting of the board may be called *only* by the presiding officer of the board or by a majority of the board members. When a special meeting is called, written notification of the special meeting must be given to each member of the board and to each local newspaper of general circulation, radio station, or television station requesting notice in writing. Such notice must be received at least 24 hours prior to the special meeting. In addition, the call and notice must be posted at least 24 hours prior to the special meeting in a location that is freely accessible to members of the public during the 24-hour period. This notice must be given even if no action is to be taken at the special meeting.

The call and notice of a special meeting must also specify the time and place of the meeting and the specific business to be transacted or discussed. The agenda must also provide an opportunity for the public to address the board regarding any agenda item prior to or during board consideration of that item.[40] While there is limited authority for a board to act on non-agendized business at regular meetings, no business may be considered or acted upon in special meetings which is not specifically included in the agenda.

A board member has the right to waive the notice requirement by filing with the board's clerk or secretary a "written waiver of notice" prior to or at the time of the meeting, or by telegram. Such notice may also be waived if the member is present at the convening of the meeting.

EMERGENCY MEETINGS

In emergency situations entailing threatened or actual disruption of public facilities, the board may hold emergency meetings without compliance with the special meeting 24-hour notice requirement or the 24-hour posting requirement.[41] Emergency situations are defined in Government Code section 54956.5 as follows:

- a work stoppage or other activity that severely impairs public health or safety or both, as determined by a majority of members of the board; or
- a crippling disaster severely impairing public health or safety, or both, as determined by a majority of the members of the board.

While the 24-hour notice requirement is not required for these emergency meetings, the presiding officer or designee must still give newspapers and radio and television stations that have requested in writing notice of special meetings a one-hour notice by telephone if the telephones are operating. If the telephones

are not working, notice must be given to the media that the emergency meeting was held, the purpose of the meeting, and the action taken during the meeting as soon as possible after the meeting. *No closed session may occur during an emergency meeting.* All requirements for special meetings, other than the notice requirement, must be complied with in the event of an emergency meeting.

The minutes of an emergency meeting, a list of persons whom the board notified or attempted to notify, a copy of the roll call vote, and any actions taken at the meeting must be posted in a public place as soon as possible after the meeting and left posted for a minimum of 10 calendar days.

ADJOURNED MEETINGS

Regular or special meetings may be adjourned to a later time and place as specified in the order of adjournment.[42] An adjourned regular meeting is considered a regular meeting for purposes of the Brown Act. Less than a quorum of the governing body may determine to adjourn such meetings. A copy of the order of adjournment shall be placed on or near the door of the place where the regular or special meeting was adjourned within 24 hours after the time of the adjournment.

In the event that all board members are absent from any regular or adjourned regular meeting, the clerk or secretary of the board may adjourn the meeting to a stated place and time. The clerk or secretary shall further provide notice for the adjourned meeting pursuant to the special meeting notice requirements, discussed above, absent a waiver.

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[34] Government Code section 54954.2; Education Code section 35145.5.

[35] Government Code section 54954.3(c).

[36] Government Code section 54954.2.

[37] Government Code section 54954.2(a); Education Code section 35145.

[38] Government Code section 54954.2(a).

[39] Government Code section 54953(b)(3).

[40] Government Code section 54954.3(a).

[41] Government Code section 54956.5.

[42] Government Code section 54955.

Chapter

5

CLOSED SESSIONS

AUTHORITY FOR CLOSED SESSIONS

A closed session is an exception to the general rule that board meetings must be open and public. The Legislature has declared that business affecting the public may be conducted behind closed doors only in narrowly defined circumstances. Closed sessions may be held at regular and special meetings; they are *not* authorized for emergency meetings. If a board has the right to consider a matter in closed session, it may also act upon such matter in closed session.[43] (But see the student expulsion discussion below.) However, the board is required to publicly report certain actions (not all actions — only those specified by law) taken in closed session and the vote or abstention of every member present.[44] The required content of the public report is specified in Government Code section 54957.1 for each type of closed session.

The Brown Act and Education Code delineate the circumstances under which a legislative body of a local agency may meet in closed session and limit legislative bodies to the types of closed sessions identified.[45] The Brown Act authorizes closed sessions for the following:

1. ***License application.*** Consideration of an applicant for a license or license renewal who has a criminal record.[46]

2. ***Real estate negotiation.*** A board is permitted to hold a closed session with its negotiator (who may or may not be a member of that body) prior to the conclusion of certain real property transactions, including the renewal or renegotiation of leases, for the purpose of giving instructions regarding the price and terms of payment.[47] Before going into closed session, however, the board must disclose in public session the identity of the property or properties that the negotiations may concern, as well as the person (not the person's agent) or persons with whom the negotiator may negotiate. (Closed sessions

regarding a contemplated eminent domain (condemnation) proceeding are authorized under the "pending litigation" closed session — see below.)

3. *Pending litigation.* A board may meet, on advice of its legal counsel, to confer with or receive advice from counsel regarding pending litigation when public discussion would prejudice the district's position in the litigation.[48] This is the exclusive authorized use of closed sessions under the attorney-client privilege. However, the Brown Act does not restrict privileged communications outside board meetings (such as an advice letter) between legal counsel and the board or its members, and it does not require disclosure of such privileged written communications.

Under Government Code section 54956.9, litigation is "pending" if:

a) an adjudicatory proceeding, including eminent domain, has already been initiated in a court, administrative agency, or arbitration, if the district is a party; or

b) on counsel's advice, the board decides that a point has been reached where, based on existing facts and circumstances, there is "significant exposure" to litigation against the district, or the board is meeting solely to determine whether a closed session is authorized under the significant exposure provision.

As stated above, the "significant exposure" determination must be based on "existing facts and circumstances." These are limited to:

1) facts and circumstances that might result in litigation against the district but which the board believes are not yet known to potential plaintiffs. Such facts and circumstances need not be publicly specified;

2) facts and circumstances, including but not limited to an accident, disaster, incident or transactional occurrence that might result in litigation against the district and that are already known to a potential plaintiff or plaintiffs. *Such facts and circumstances must be publicly disclosed before the closed session or specified on the board meeting agenda;*

3) receipt of a tort claim or written threat of litigation from a potential plaintiff. The claim or written communication must be available for public inspection in the same manner as other public district material;

4) a threat of litigation regarding a matter within the district's jurisdiction made by a person in an open and public board meeting; or

5) a threat of litigation regarding a matter within the district's

jurisdiction made by a person outside an open and public board meeting. The threat could be made directly to a district official or employee or could be communicated to the official or employee by someone else. In either event the district official or employee receiving knowledge of the threat must have made a contemporaneous or other record of the threat prior to the board meeting. That record must be available for public inspection in the same manner as other public agenda material. The record need not identify the alleged victim of the unlawful or tortuous sexual conduct or anyone making the threat on their behalf, or identify the employee who is the alleged perpetrator *unless the identity of the person has already been publicly disclosed.*

c) based on existing facts and circumstances, the agency has decided or is deciding whether to initiate litigation.

In the circumstances described above, the possibility that litigation may occur cannot be purely speculative. The assessment of the board and its legal counsel of the pendency of litigation must be grounded on specific facts and circumstances that exist at the time of the closed session.

Government Code section 54956.9 requires that the board, prior to holding a closed session under the "pending litigation" exception, follow certain procedures. First, the district must state on the agenda or publicly announce which one of the subdivisions of the statute authorizing closed sessions on "pending litigation" (i.e., which subdivision of section 54956.9) authorizes the closed session. If it is authorized under (a) above, the statement shall identify the title of or otherwise specifically identify the litigation to be discussed, unless the board states that to do so would jeopardize the district's ability to effectuate service of process upon one or more unserved parties, or that to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage.[49]

4. *Liability claims.* The joint powers authority (JPA), created for the purposes of insurance pooling, or a local agency member of the JPA, or the local agency self-insurance authority or a local agency member of the authority, may hold a closed session to discuss a claim for the payment of tort liability losses, public liability losses or workers' compensation liability incurred by the joint powers agency or a local agency member of the joint powers agency.[50]

5. *Public security.* A board may meet in closed session with the attorney general, district attorney, sheriff, police chief or their deputies on matters posing a threat to the security of public buildings or a threat to the public's right of access to public services or facilities. However, the board is prohibited

from discussing the district's funds, funding priorities, or budget during this type of closed session.[51]

6. Personnel exception. A board may meet in closed session to consider (including taking action on) the appointment, employment, evaluation of performance, discipline or dismissal of a public employee. ("Public employee" also includes an officer or an independent contractor who functions as an officer or employee, but does not include any other independent contractor, any elected official, or any member of a legislative body.)

A board may also meet in closed session to hear complaints or charges against a public employee by any person, including another employee. However, before the board holds a closed session to consider "specific" complaints or charges brought against an employee by another person or employee, the employee must be given written notice of his/her right to have the complaint or charges heard by the board in open (public) session rather than in closed session. The notice must be *delivered* personally or by mail at least 24 hours in advance of the time for holding the closed session. *Failure to give the required notice makes any disciplinary or other action taken by the board against that employee based on those complaints or charges null and void.*[52]

In this "personnel" type of closed session, the board is prohibited from discussing the district's funds, funding priorities, or budget.

7. Labor negotiations.[53] The board may meet in closed session with the board's designated representatives regarding salaries, salary schedules, or compensation paid in the form of fringe benefits for the district's represented and unrepresented employees. When the negotiations are with "represented" employees, *all* matters within the statutory scope of representation (negotiations) may be considered; when negotiations are with "unrepresented" employees, only salaries, salary schedules, and compensation in the form of fringe benefits may be considered. The Brown Act prohibits discussion of the local agency's available funds, funding priorities, or budget in these closed sessions, except insofar as such discussions relate to providing instructions to the board's negotiators. (The term "employee" includes any officer or an independent contractor who functions as an officer or employee, but not an elected official, member of a legislative body, or other independent contractors.)

The purpose of this type of closed session is for the board to review its position and instruct its representatives. The sessions may occur prior to and during consultations and discussions with represented employee groups and unrepresented employees. Closed sessions are also permitted with state conciliators who have intervened in the proceedings.[54]

The law prohibits, in this type of closed session, final action on the proposed compensation of one or more unrepresented employees.

8. ***Education Code authority for closed session to consider particular student matters.***[55] The Education Code, not the Brown Act, authorizes closed sessions to consider discipline of any student or to consider any action involving a student where disclosure of information would violate the privacy of student records protected from disclosure by state and federal law.[56]

Closed sessions for student discipline are mandatory unless the parents or student (after proper notice) otherwise request, in which case the business must be conducted in public. Even here, however, matters conflicting with the privacy rights of students who are not the subject of the discipline must still be discussed in closed session.[57] Also, unlike personnel matters, final board action in a student discipline case must be *taken*, not just announced, in public session.[58] A board that has tentatively decided a student's case in closed session should reconvene in public session and vote publicly.[59]

Education Code section 48918(c) provides that whether a K-12 expulsion hearing is conducted in closed or open (public) session, the board may "deliberate" in private. However, the parent or guardian, the pupil and their legal counsel must be allowed to attend that "deliberation" portion of the closed session if the board permits anyone else to be present during the closed deliberations.

CLOSED SESSION AGENDAS

A closed session may be conducted only during a regular or special meeting that has been called with proper notification.[60] Government Code section 54954.2 also requires that brief agenda descriptions be provided concerning matters to be heard in closed session. To this end, Government Code section 54954.5 provides sample formats for agenda descriptions for closed session items. *The law does not require use of these particular formats*, but if a district uses them, it will be exempt from liability based on a challenge to the adequacy of the agenda item.

The following include several applicable agenda descriptions provided by that section. Please refer to Section 54954.6 for additional examples.

1. For closed session items concerning real property transactions pursuant to Government Code section 54956.8:

   CLOSED SESSION: CONFERENCE WITH REAL PROPERTY NEGOTIATORS
   Specify the street address, or if no street address the parcel number or other reference of the realty. Also specify whether instruction to

negotiator will concern price, terms of payment, or both. Also specify name of the agency's negotiator and the name of the party with whom negotiations will occur.

If the designated representative or negotiator in unable to attend the closed session, an agent or designee may participate in his/her place. However, the name of the agent or designee must be announced at an open session held prior to the closed session. (Government Code 54954.5)

2. For closed session items concerning conferences with legal counsel regarding existing litigation pursuant to Government Code section 54956.9:

   CLOSED SESSION: *CONFERENCE WITH LEGAL COUNSEL — EXISTING LITIGATION — Subdivision (a) of Government Code section 54956.9.*

   Name of case: Specify by reference to claimant's name, names of parties, case or claim numbers.

   or

   If case name is unspecified, specify whether disclosure would jeopardize service of process or existing settlement negotiations.

3. For closed session items concerning conferences with legal counsel regarding anticipated litigation pursuant to Government Code section 54956.9:

   CLOSED SESSION: *CONFERENCE WITH LEGAL COUNSEL — ANTICIPATED LITIGATION — Significant exposure to litigation pursuant to subdivision (b) of Government Code Section 54956.9*

   Specify number of potential cases. In addition to this information, the agency may be required to provide additional information on the agenda or in an oral statement prior to the closed session, pursuant to subparagraphs (B) to (E), inclusive, of paragraph (3) of subdivision (b) of Section 54956.9.

   or

   Initiation of litigation pursuant to subdivision (c) of Section 54956.9: (Specify number of potential cases.)

4. For closed session items discussed by joint powers agency pursuant to Government Code section 54956.95:

   CLOSED SESSION: *LIABILITY CLAIMS*

   Specify name of claimants and specify name of the agancy against which the claim is made.

5. For closed session items concerning a threat to public services discussed pursuant to Government Code section 54957:

   CLOSED SESSION: *THREAT TO PUBLIC SERVICES OR FACILITIES*

Specify name of law enforcement agency and title of officer with whom consultation will occur.

6. For closed session discussions concerning personnel matters pursuant to Government Code section 54957:

   CLOSED SESSION: *PUBLIC EMPLOYEE APPOINTMENT*
   Specify description of position to be filled.
   CLOSED SESSION: *PUBLIC EMPLOYMENT*
   Specify description of position to be filled.
   CLOSED SESSION: *PUBLIC EMPLOYEE PERFORMANCE EVALUATION*
   Specify the position title of employee being reviewed.
   CLOSED SESSION: *PUBLIC EMPLOYEE DISCIPLINE/ DISMISSAL/ RELEASE*
   (No additional information is required in connection with a closed session to consider discipline, dismissal, or release. "Discipline" includes potential reduction of compensation.)

7. For closed session items discussed pursuant to Government Code section 54957.6:

   CLOSED SESSION: *CONFERENCE WITH LABOR NEGOTIATORS*
   Specify names of agency's designated representatives atttending the closed session.
   If the designated representative or negotiator is unable to attend the closed session, an agent or designee may participate in his/ her place; however, the name of the agent or designee must be announced at an open session held prior to the closed session.
   or
   Specify the name of the organization representing the employees in question or if it is an unrepresented employee. Specify the position title of the unrepresented employee who is the subject of the negotiations.

ANNOUNCEMENT IN PUBLIC OF PURPOSE OF CLOSED SESSION BEFORE GOING INTO CLOSED SESSION

Prior to holding any closed session, the board must orally disclose in public session the item(s) to be discussed in that particular closed session.[61] The disclosure may take the form of a reference to the item or items as they are listed by number or letter on the agenda or may be an oral statement of the same information.

ANNOUNCEMENT IN PUBLIC OF ACTIONS TAKEN IN CLOSED SESSION

With limited exceptions, the law allows the board to act (vote) in closed session on legitimate closed session matters. The Brown Act requires that when the board takes action on a matter in closed session, certain types of those actions taken in closed session be reported in public session, usually at the public portion of the same meeting after the closed session action. The descriptions below are keyed to the closed session authorizations described above.

1. Approval of agreement concluding real estate negotiations. If the board's own vote makes the agreement final, the board must report in open session at the public meeting in which the closed session is held, the approval, the substance of the agreement, and the vote (including abstentions) of every member present. If final approval requires approval by another party, the district must disclose the fact of that approval, the substance of the agreement, and the vote (including abstentions) of every board member present to anyone who inquires, as soon as the other party has approved the agreement and informed the district of that approval.[62]
2. Approval to legal counsel to *defend, appeal, or not appeal, or appear in litigation as "friend of the court"* — Report the action in open session at the public meeting in which the closed session is held, including the vote (including abstentions) of every board member present. The report must also identify, if known, the adverse parties and the substance of the litigation.[63]
3. In the case of approval to legal counsel to *initiate or intervene in a lawsuit*, the announcement need not identify the action, defendants or other particulars, but must state that direction to sue or intervene has been given and that the action, the defendants and the details will be disclosed to anyone inquiring after the lawsuit is commenced unless doing so would jeopardize the district's ability to serve process on one or more unserved parties, or doing so would jeopardize its ability to conclude existing settlement negotiations to its advantage. The vote (including abstentions) of every board member present must be given.
4. Approval given to legal counsel to *settle pending litigation* — If the board's action accepts a signed offer from the other party(ies) and makes the settlement final, report in open session at the meeting during which the closed session is held, the approval, the substance of the agreement, and the vote (and abstentions) of all board members present. If final approval

rests with the other party or with the court, report the fact of approval, the substance of the agreement, and the vote (and abstentions) of all board members present to anyone who inquires once the settlement is final.[64]

5. Disposition of claims — Report "as soon as reached" and include the name of the claimant(s), name of the district claimed against, substance of claim, monetary settlement agreed upon by the district and the claimant, and the vote (including abstentions) of all board members present.[65]
6. Action taken to appoint, employ, dismiss, accept the resignation of or otherwise affect the employment status of an employee — Report at the public meeting during which the closed session is held, the action and vote (and abstentions) of all board members present, and the title of the position. *However, do not report a dismissal or the nonrenewal of an employment contract until the first public meeting following exhaustion of administrative remedies, if any.*[66]
7. Approval of an agreement concluding labor negotiations with represented employees pursuant to Section 54957.6 — Report after the agreement is final and has been accepted or ratified by the other party. Identify the items approved and the other parties to the negotiations, also the vote (including abstentions) of all board members present.[67]

How does the district make the required reports of closed session actions? Report orally or in writing. If a member of the public is present when the closed session ends, and has either made a standing request for notice of meetings (under sections 54954.1 or 54956) or has submitted a written request within 24 hours of the posting of the agenda of the meeting at which the closed session was held, give that person copies of contracts, settlement agreements, or other documents finally approved or adopted in the closed session. If the action taken results in one or more substantive amendments to these documents requiring retyping, they may be retyped during normal business hours before being released, but the presiding officer or designee must orally summarize the amendments for the documents requested and for others present who request the information. In addition, any person who requests may inspect the documents on the next business day after the meeting or, in the case of substantial amendments, when all necessary retyping is done, after they are retyped. See section 54957.1(b)(c).

It is recommended that the superintendent and clerk of the board review Government Code section 54957.1 for all the details of closed session action public reporting requirements.

SPECIAL COLLECTIVE BARGAINING CONSIDERATIONS

The Educational Employment Relations Act (EERA; Government Code section 3540 and following) excludes certain proceedings from the requirements of the Brown Act and the board meeting statutes in the Education Code, unless otherwise agreed upon by the parties.[68] These proceedings include:

1. any meeting and negotiating discussion between a public school employer and a recognized or certified employee organization;
2. any meeting of a mediator with either party or both parties to the meeting and negotiating process;
3. any hearing, meeting, or investigation conducted by a factfinder or arbitrator; and
4. any closed session of the public school employer or between the public school employer and its designated representative for the purpose of discussing its position regarding any matter within the scope of representation and instructing its designated representatives.

The EERA requires that all "initial" proposals of public employers and exclusive representatives be presented at a public meeting.[69] Additional meeting and negotiating regarding any proposal cannot occur until reasonable time has elapsed that would provide the public with the opportunity to become informed regarding the proposal and express its opinion. After such an opportunity, the board may adopt its initial proposal at an open session meeting. New subjects of meeting and negotiating arising after presentation of initial proposals must be made public within 24 hours.

The EERA also requires that a school district disclose to the public at a public meeting the major provisions of any tentative agreement with an exclusive bargaining representative.[70] Such disclosure includes, but is not limited to, the costs that would be incurred by the district under the agreement for current and subsequent fiscal years. The disclosure should be made in a written statement made available to the public prior to the board meeting, posted with the agenda, and should be on the agenda as an information item preceding the agenda item on which the board will take action on the tentative agreement.

[43] *Lucas vs. Board of Trustees* (1971) 18 Cal.App.3d 988, 991-992.
[44] Government Code section 54957.1.
[45] Government Code section 54962.
[46] Government Code section 54956.7.
[47] Government Code section 54956.8.
[48] Government Code section 54956.9.
[49] Government Code section 54956.9.
[50] Government Code section 54956.95.
[51] Government Code section 54957.
[52] Government Code section 54957.
[53] Government Code section 54957.6.
[54] Government Code section 54957.6. Additionally, the Rodda Act (the schools' collective bargaining law) provides authority for meeting on negotiations matters in private. (See Government Code section 3549.1.)
[55] Education Code sections 35146, 48918(c) and 72122 (*not* the Brown Act).
[56] Education Code sections 35146, 48918(c) and 72122.
[57] Education Code sections 35146 and 72122.
[58] Education Code sections 35146, 48918 and 72122.
[59] Education Code sections 35146, 48918 and 72122.
[60] Government Code section 54957.
[61] Government Code section 54957.7.
[62] Government Code section 54957.1(a)(1)
[63] Government Code section 54957.1(a)(2)
[64] Government Code section 54957.1(a)(3).
[65] Government Code section 54957.1(a)(4).
[66] Government Code section 54957.1(a)(5).
[67] Government Code section 54957.1(a)(6).
[68] Government Code section 3549.1.
[69] Government Code section 3547.
[70] Government Code section 3547.5.

Chapter

6

RECORDS OF MEETINGS AND PUBLIC ACCESS TO DOCUMENTS

RECORDS OF OPEN MEETINGS

Education Code section 35145 provides that minutes must be taken of all actions taken by the governing board. Education Code section 35163 also requires that every official board action to be affirmed by a formal vote of the members of the board and kept in a journal of its proceedings.

With limited exceptions, documents such as the minutes and agendas constitute public records that are available to the public for inspection.[71] In fact, all writings distributed to the board at an open session meeting for consideration of an open session matter constitute public records, and are subject to public inspection. Such writings must be made available, upon request, for public inspection at the meeting if prepared by the school district or governing board, or after the meeting if prepared by some other person. The board has the discretion to charge a standard fee or deposit for copies made which covers the direct costs of duplication.

Certain documents remain exempt from public disclosure as public records, including:

1) initiative, referendum and recall petitions calling for special elections to fill board vacancies;[72]
2) preliminary drafts, notes or interagency or intra-agency memoranda not retained by the agency in the ordinary course of business, provided that the public interest in non-disclosure outweighs the public interest in disclosure;[73]
3) records pertaining to pending litigation;[74]
4) personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy;[75]
5) contents of real estate appraisals, etc.;[76] and
6) documents protected by privilege.[77]

As discussed previously, any person attending a board meeting has the right to record the proceedings on a tape or audio recorder, or by still or motion picture camera, unless the board reasonably finds that such a recording is, or would be, persistently disruptive of the meeting.[78] In addition, no legislative body may prohibit or otherwise restrict the broadcast of its proceedings, absent a reasonable finding that the broadcast will result in noise, illumination or obstruction of view that would constitute a persistent disruption of the proceeding.[79]

RECORDS OF CLOSED SESSIONS

Education Code section 35145 requires that minutes of actions taken by the board be kept for all public meetings; it does not address closed sessions. Government Code section 54957.2 provides that a governing board may by resolution designate a clerk, officer or employee to attend and maintain minutes of each closed session. The minutes of closed sessions are not public record, and are not subject to disclosure under the Public Records Act. Only members of the governing board or persons designated by court order may have access to closed session minutes. Actions taken in closed session, when announced in public session, should be incorporated into the minutes of the meeting.

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[71] Government Code section 54957.5; Education Code section 35145; see also California Public Records Act, Government Code section 6250 and following.

[72] Government Code section 6253.5.

[73] Government Code section 6254(a).

[74] Government Code section 6254(b).

[75] Government Code section 6254(c).

[76] Government Code section 6254(h).

[77] Government Code section 6254(k).

[78] Government Code section 54953.5.

[79] Government Code section 54953.6.

Chapter

7

ENFORCEMENT, PENALTIES AND REMEDIES

ENFORCEMENT

Existing law contains authority for the district attorney or any interested person to file a lawsuit to stop or prevent violations of the Brown Act by the governing board, to determine the validity of any rule or action by the governing board to penalize or otherwise discourage the expression of one or more of its members, or to compel the board (upon a court finding that the board has violated certain Brown Act requirements) to tape record its closed sessions.[80]

Another statute, section 54960.1, authorizes the district attorney or any interested person to file a lawsuit for the purpose of having specified types of board action declared null and void; other specified board actions are exempt from being declared null and void. Prior to instituting such an action, the district attorney or interested person must demand in writing that the legislative body "cure or correct" the action allegedly made in violation of the Brown Act. The demand must be made within 90 days from the date action was taken, unless the alleged violation was an agenda description in violation of Government Code section 54954.2. Under the latter circumstances, the demand to cure or correct must be made within 30 days from the date of the action.

Within 30 days of receipt of the demand, the board must cure or correct the challenged action and inform the demanding party in writing of the cure or correction, or inform the demanding party of its decision not to cure and correct the action. If no action is taken by the board within the 30-day period, the inaction is deemed a decision not to cure or correct. Within 15 days after the running of the 30-day period or within 15 days after actually being notified of the decision to not cure and correct, the demanding party must initiate the lawsuit described above or thereafter be barred from suing.

Ultimately, during any judicial action to determine if a Brown Act

violation occurred, if the court determines that the legislative body took action to cure or correct the alleged violation, the lawsuit will be dismissed with prejudice. Also, the fact that the board took action to cure or correct is not admissible as evidence of a violation of the Brown Act.

PENALTIES

Each member of a board who attends a meeting of the board where action is taken in violation of any provisions of the Brown Act, and who intends to deprive the public of information to which the member knows or has reason to know the public is entitled under the Brown Act, is guilty of a misdemeanor.[81] Thus, the Brown Act only provides for criminal penalties where a meeting is conducted; at which action is taken; and the board member had the actual or implied "wrongful intent" to deprive the public of information. What circumstances may be found to produce the requisite wrongful intent will be assessed on a case-by-case basis.

Finally, if a plaintiff successfully challenges a board based upon alleged violations of Brown Act provisions, a court may (and probably must) award court costs and reasonable attorneys fees to the plaintiff. However, where the plaintiff's legal action against the district is "clearly frivolous and totally lacking in merit," the defendant legislative body would be entitled to recovery of costs and attorneys fees from the plaintiff.

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[80] Government Code sections 54960, 54960.1.

[81] Government Code section 54959.

Chapter

8

CONCLUSION

CONCLUSION

The Brown Act (contained in the Government Code) and Education Code regulates how governing boards and other defined entities conduct their business, including their meetings. The discussion in this book is necessarily general; each case must be analyzed on its individual facts. Whenever there is a compliance question or any question as to whether a meeting or a portion of a meeting must be held in open or closed session, it is best to contact the school district's legal counsel to ensure compliance with the law.

Appendix

FAQs

FREQUENTLY ASKED QUESTIONS

FREQUENTLY ASKED QUESTIONS ABOUT THE RALPH M. BROWN ACT

Q1: May all board members attend a social function together without violating provisions of the law regulating meetings?

A1: *YES.* So long as the board members do not discuss, deliberate or act on what can be characterized as district business, no "meeting" has occurred.

Q2: May all board members attend a California School Boards Association conference together without violating the law?

A2: *YES.* See Answer No. 1.

Q3: May all board members attend a National School Boards Association conference together?

A3: *YES.* See Answer No. 1.

Q4: Can the board meet in closed session without having an agenda item saying "closed session?"

A4: *NO.* Recent amendments now require a brief general description of each item of business to be transacted, including items to be discussed in closed session. Government Code section 54954.5 provides "safe harbor" language for closed session agenda items.

Q5: Can the board discuss in closed session what salary to pay a particular employee?

A5: *YES.* Government Code section 54957.6 allows a board to discuss in closed session with the board's designated representative matters concerning salaries, salary schedules, and fringe benefits. The board may conduct these discussions relative to represented (bargaining unit members) and unrepresented (management, confidential and supervisorial) employees.

Q6: Can the board decide in closed session the duties of a particular position?

A6: *NO.* As a general matter, the duties assigned to positions are a policy matter outside the "personnel" exception to the public meeting law.

Q7: Can the board's attorney explain to the board in closed session the statutory layoff procedure?

A7: *NO.* A simple explanation of the layoff procedure provided by law has nothing to do with the appointment, employment, or dismissal of a particular employee, and if this is all that is being done it is an appropriate matter for public session. There will be cases, however, where there is a layoff currently being conducted and, in the course of those proceedings, the layoff proceedings may be under attack by representatives of the employees. Under those circumstances, various aspects of the statutory layoff procedure in the context of the particular adversarial proceeding might be discussed along with an explanation to the board of its defenses. Under those circumstances, a closed session could be justified, in our opinion, under the "attorney-client" exception based upon current or pending litigation. See Answer No. 15 for further explanation.

Q8: Does a strike by school employees justify the call for an emergency meeting without complying with the 24-hour notice requirement for special meetings?

A8: *YES.* Work stoppages or other activities that severely impair public health or safety, as determined by the school board, authorize an emergency meeting without complying with the 24-hour notice requirement.

Q9: May an emergency meeting called due to a strike take place in closed session?

A9: *NO.* There can be no closed sessions at an emergency meeting. The meeting can take place if conducted in the public session and the board has made the required finding regarding severe impairment of public health or safety.

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Q10: Must the board record minutes for all closed sessions?

A10: *NO.* The keeping of minutes for closed session matters is discretionary. However, minutes are required for all open session actions.

Q11: Must any "action taken" in closed session be reported out in public session either at the next public portion of that meeting or at the next public meeting, along with the roll call vote thereon?

A11: *NO.* Legally specified types of action taken must be reported at the meeting during which the closed session occurs as required by Government Code section 54957.1. The board must reconvene in open session prior to adjournment to make the disclosure. The only exceptions to this requirement are set forth in Government Code section 54957.1.

Q12: May an employee be fired in closed session?

A12: *YES.* The law specifically allows a school district to dismiss a public employee in closed session. Of course, such a dismissal is an "action taken" to dismiss a public employee and, therefore, must be reported out in the public portion of the meeting, along with the specific roll call vote thereon, unless the employee has an administrative process remaining to challange the dismissal.

Q13: Can the board in closed session review complaints about the board president?

A13: *NO.* Several years ago, the law was amended to exclude complaints about board officers and other board members from closed session subjects. These must now be handled in public session. This situation should be distinguished from one of the exceptions to the public meeting requirement that allows the board to hear in closed session complaints or charges against a public employee made by another employee or any other person.

Q14: Can the board in closed session replace the president of the board?

A14: *NO.* Replacement of board officers was covered by the same amendments discussed in Answer No. 13.

Q15: Can the board in closed session discuss all legal matters with its attorney?

A15: *NO.* The Brown Act does not permit the board to meet with its attorney over all legal matters. The board may legally meet with its attorney in closed session, ". . . to confer with, or receive advice from its legal counsel regarding pending litigation when discussion in open session" would prejudice the board's position in the litigation.

Section 54956.9 of the Government Code defines pending litigation as falling into the following circumstances:

(a) Litigation, to which the District is a party, has been initiated formally.

(b) (1) A point has been reached where, in the opinion of the board on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation against the local agency.

(2) Based on existing facts and circumstances, the board is meeting only to decide whether a closed session is authorized pursuant to paragraph (b)(1).

(3) For purposes of paragraphs (1) and (2), "existing facts and circumstances" shall consist only of one of the following:

(A) Facts and circumstances that might result in litigation against the District but which the District believes are not yet known to a potential plaintiff or plaintiffs, which facts and circumstances need not be disclosed.

(B) Facts and circumstances, including, but not limited to, an accident, disaster, incident, or transactional occurrence that might result in litigation against the District and that are known to a potential plaintiff or plaintiffs, which facts or circumstances shall be publicly stated on the agenda or announced.

(C) The receipt of claim pursuant to the Tort Claims Act or some other written communication from a potential plaintiff threatening litigation, which claim or communication shall be available for public inspection.

(D) A statement made by a person in an open and public meeting threatening litigation on a specific matter within the responsibility of the board.

(E) A statement threatening litigation made by a person outside an open and public meeting on a specific matter within the responsibility of the board so long as the official or employee of the District receiving knowledge of the threat makes a contemporaneous or other record of the statement prior to the meeting, which record shall be available for public inspection. The records so created need not identify the alleged victim of unlawful or tortious sexual conduct or anyone making the threat on their behalf, or identify a public employee who is the alleged perpetrator of any unlawful or tortious conduct upon which a threat of litigation is based, unless the identity of the person has been publicly disclosed.

(c) Based on existing facts and circumstances, the legislative body of the local agency has decided to initiate or is deciding whether to initiate litigation.

Q16: In public session, a member of the public comes to the podium and states that Superintendent Bill Smith is an incompetent nincompoop. Does the board have the right to require that, if this person wants to complain about the superintendent further, it can be done in closed session?

A16: *NO.* Under the Baca v. Moreno Valley decision, a legislative body cannot censor in advance public speech that includes criticisms about a specific employee or require that such discussions not take place in public. If a person makes defamatory statements (i.e., purportedly factual statements as opposed to pure opinion) the board may warn the person that such discussion is out of order and that the person's statements may no longer be subject to privilege and could place the person at risk of civil liability.

Q17: Can the board hear a complaint about an employee in closed session without first informing the employee that he/she is going to be complained about so that the employee may have the matter heard in open sesson?

A17: *NO.* The law requires that an employee must be given 24 hours' written notice before the board hears complaints or charges against him or her, but only requires that the employee be given the option of having the matter heard in open session. The notice is a condition to holding a closed session to hear complaints and charges and failure to give the required notice voids any disciplinary or other action taken by the board based on the complains or charges.

Q18: Before releasing a probationary certificated employee, must the board give the employee 24 hours' prior written notice that it will be considering the action and give the employee the option of having the matter heard in open session?

A18: *NO.* Unless the release is based on specific charges or complaints against the employee, the board is not required to give the employee prior notice or hear the matter in open session. Consideration of performance evaluation is not considered a complaint or charge.

Q19: Does the board always have the option of hearing complaints about employees in closed or open session?

A19: *NO.* If it is the kind of complaint or charge against an employee that is a legitimate subject for a closed session, the board may hear the complaint in closed session unless the employee being complained about requests that the complaints be stated to the board in public session. In the latter event, the board has no discretion; it must hear the complaints in public session. If the employee does not exercise his option, the district has the option of closed or open session. As noted above, the board must give the employee 24 hours' prior written notice that it will be hearing the complaint or charge.

Q20: Can the board have a study session before a regular meeting?

A20: *NO.* Except meetings involving collective bargaining positions in which the board's designated representative is meeting with the board to discuss and receive instructions regarding the board's bargaining positions or other collective bargaining matters, a study session, financial briefing or any other session of this type is an integral part of a regular or special meeting of the board. It cannot come "before" such a meeting. Such a session should be agendized and made part of the meeting.

Q21: Can the board have a closed session for personnel matters before a regular meeting.

A21: *NO.* See Answer No. 20. The board may, however, adjourn immediately into closed session for legitimate personnel considerations after starting the meeting in open session and allowing public comment on items on the closed session agenda, provided the closed session is properly agendized.

Q22: Can the board have a meeting with its bargaining representatives in closed session before a regular meeting?

A22: *YES.* The Rodda Act contains a broad exemption from the public meeting law for various types of collective bargaining matters. The board's meeting with its bargaining representatives to discuss board positions in collective bargaining is within that exception.

Q23: If a classified employee is fired in closed session, can the announcement simply say, "Tonight in closed session, a classified employee was dismissed. The vote was 3-2 to approve the termination?"

A23: *NO.* The law requires that if such action is taken in closed session, the action must be reported out in the public session of that meeting (unless administrative remedies have not been exhausted) and the vote or abstention of every member present. The report must identify the position of the employee.

Q24: Must the general purpose of the closed session be disclosed in public if the action to be taken in closed session is an action other than to appoint, employ or dismiss a public employee?

A24: *YES.* The purpose of the closed session must be stated in the agenda and the presiding officer must, in open session, disclose the item(s) to be discussed in the closed session. It is sufficient to reference the item(s) by agenda number or letter. See Government Code section 54954.5 for "safe harbor" language in describing closed session items.

Q25: Can a board member be charged with a crime if he or she mistakenly brings up a matter in closed session that must, under the law, be handled in public session?

A25: *NO.* Section 54959 of the Government Code provides:

Each member of a legislative body who attends a meeting of such legislative body where action is taken in violation of any provision of this chapter, and where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled under this chapter, is guilty of a misdemeanor.

The key word in the facts of the question is "mistakenly." Only intentional violation of the law will bring about criminal liability.

Q26: If a matter is acted on in closed session that must, by law, be acted on in public session, is the closed session action void?

A26: *YES*, if a suit is filed challenging the action in a timely manner. Other provisions of law require that the public agenda of any board meeting contain a relatively specific statement of the matter to be acted on by the board of trustees. Earlier cases have held that where the board acted on an agenda item that was insufficiently specific, the action is void. Therefore, assuming there was nothing on the agenda that identified the specific action to be taken in closed session and that action was, by law, required to be taken in public session, the action would be void.

Q27: Can the issue of whether to reduce or discontinue particular kinds of certificated services be acted on in closed session?

A27: *PROBABLY NO.* The decision to reduce or discontinue particular kinds of services is generally a policy matter to which the public has a right to give its input and listen to the deliberations.

Q28: Can the final vote to approve a proposed decision by the administrative law judge to terminate the services of specific employees based upon a "particular kinds of service" layoff be taken in closed session?

A28: *PROBABLY YES.* Although a California appellate court has ruled that school boards must consider the administrative law judge's proposed decision in open session, this is based on language governing personnel matters that has since been repealed. In any event, the board can probably review the decision in closed session with legal counsel as a matter relating to pending litigation.

Q29: Can the board in closed session act on the decision of a Commission on Professional Competence to terminate a permanent certificated employee for cause?

A29: *NO.* This is a trick question. Under the law, the decision of a Commission on Professional Competence to terminate a permanent, certificated employee for "cause" is not a matter to be acted on by a board of trustees. The decision of the Commission on Professional Competence in this respect is, under the statute, the decision of the governing board. If the governing board disagrees with the decision of a Commission on Professional Competence, it must seek a review of that decision through filing a Petition for Writ of Administrative Mandamus in the Superior Court. If properly agendized, a closed session would be permissible to discuss that potential litigation.

Q30: Is "consideration of service levels" a sufficient agenda item to adopt a resolution to reduce particular kinds of certificated services for the next year?

A30: *PROBABLY NO.* The cases interpreting the law require that each matter to be acted on in public session be acted on under a relatively specific agenda item. It would appear that this agenda item is not sufficiently specific (i.e., it does not give the public actual notice of what the board will be considering acting upon).

Q31: A toxic chemical has been discovered in the water supply of a school district. Can the board meet in special session only after a 24-hour notice of a special meeting?

A31: *NO.* Under the law, emergency circumstances may justify a meeting of the board of trustees with less than a 24-hour notice. This would come within the scope of the definition of emergency circumstances, so long as the board makes the required findings.

Q32: Can the board ask an impartial third party to assist it in closed session to hear a complaint against an employee?

A32: *NO.* As a general rule, only those persons who have a line responsibility or specific need to be present in order to effectively deal with the complaint have a right to be present. The board should not allow disinterested third parties to attend closed sessions.

Q33: In a legitimate closed session, may the superintendent and all of his/her cabinet remain in attendance?

A33: *PROBABLY NO.* See Answer No. 32.

Q34: The board has attorneys working on several different legitimate closed-session matters. May all of these attorneys remain in a closed session until all of the matters they are dealing with have been disposed of?

A34: *PROBABLY NO.* See Answer No. 32.

Q35: Can the board have a policy of circulating a sign-in sheet among the persons attending a meeting.

A35: *YES.* But see Answer Nos. 36 and 37.

Q36: Can the board require, as a condition of attendance at the board meeting, that persons attending sign the sign-in sheet?

A36: *NO.* The Brown Act prohibits the board from requiring, as a condition of attendance, signing in on an attendance sheet.

Q37: If a sign-in sheet is circulated, can it only say on it that signing in is voluntary?

A37: *NO.* The Brown Act requires that if the board does circulate a sign-in sheet, the sign-in sheet must state on its face that signing in is voluntary AND that all may attend the meeting regardless of whether one signs in. Both statements must appear.

Q38: Can the board in closed session interview applicants for board legal counsel?

A38: If the board's legal counsel is to be an employee of the district, the answer is *YES.* If the board's legal counsel is to be an independent contractor, such as an attorney in private practice, the answer is *NO.* The appointment or employment of a public officer or employee is a legitimate subject of closed session. An attorney in private practice retained by the board is not public officer or employee.

Q39: Can the board impose requirements on itself that allow the public greater access to board meetings than are required by the Brown Act?

A39: *YES.* Recent amendments to the law add provisions that allow the board to require even greater access to board meetings than are required by the law, subject to the confidentiality of personnel matters.

Q40: Can an elected board member cause a complaint by a member of the public against him or her to be heard in closed session by failing to exercise a right to have the matter heard in open session pursuant to a 24 hour written notice?

A40: *NO.* This is a trick question. An elected board member is not an employee or official entitled to a 24 hour written notice of a hearing on a specific complaint or charge made by an employee or another person. Complaints against board members must be allowed to be aired in open session subject only to duly adopted time and place limitations (Baca v. Moreno Valley). A public official would have little chance of bringing a successful action for defamation.

Q41: Can a board member participate in a meeting via teleconferencing?

A41: *YES.* The board must elect to use teleconferencing. If it does, agendas must be posted at each teleconferencing location. The agenda must identify each teleconferencing location. Each location must be accessible to the public and the meeting must be conducted in such a manner as to protect the rights of the public, including the right to address the board at each location. During teleconferencing at least a quorum of the board must be at locations within the territory over which it exercises jurisdiction.

Q42: May a board member communicate with another board member on board business by e-mail via home or office computers?

A42: *YES*, but such communications are discouraged. With the exception of teleconferencing, any use of direct communication, personal intermediaries, or technological devices by a majority of members to develop a collective communication is on an individual basis and it can become a prohibited "serial" meeting. Typically, a serial meeting is a series of communications, each of which involves less than a quorum of the legislative body, but which taken as a whole involves a majority of the body's members. If a majority of the legislative body is involved in the communications then a determination must be made as to whether the communications have been used to develop concurrence as to action to be taken. The recommendation is to avoid such inquiries by not communicating in this manner.

NOTES

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